exclusive. But since the judicial power of the United States cannot be delegated,[28] the jurisdiction of the State courts cannot be derived from the statute,[29] but must be inherent in the State court. Since this fact was present in the case under consideration, there seems to have been no reason to deny the relief sought.[30]

CLAIMS OF SECURED CREDITORS AGAINST INSOLVENT ESTATES.—In the recent case of *Price* v. *Hosterman Lumber Co. et al* (W. Va. 1911) 73 S. E. 55, it was held in accordance with the majority of American decisions that a secured creditor, upon a general assignment on the part of the debtor, need not diminish his provable claim by realizing on his security, but might receive dividends upon the entire debt *pari passu* with the unsecured creditors.[1] This doctrine, the so-called chancery rule, seems preferable on principle to the rule of bankruptcy, under which the creditor, unless he surrenders his collateral, can base his claim for dividends only upon so much of the debt as remains unsatisfied after crediting upon it the realized or estimated value of the security.[2] It is familiar law that collateral security is simply a guarantee, and in no way alters the principal obligation or the primary liability, at common law, of the debtor's personalty.[3] The property pledged is security not merely for so much of the debt as its value will represent, but for the debtor's full performance.[4] That this is true, if proof be needed, is indicated by the fact that the giving of security is not considered payment *pro tanto,* nor can the holder be required to surrender the pledge on the receipt of an amount equal to its value in payment upon the debt. It follows, then, that it must be the understanding of the parties in such transactions, in accordance

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[28]See Martin *v.* Hunter's Lessee (1816) 1 Wheat. 304, 330. This principle does not preclude the authorization of the exercise of non-judicial functions by the State courts. Robertson *v.* Baldwin (1897) 165 U. S. 275.

[29]The holding in the lower court that the act attempted to confer jurisdiction upon the State courts confuses "jurisdiction" with the "right to adjudicate upon." See 11 COLUMBIA LAW REVIEW 711.

[30]Since the jurisdiction of the State courts is derived solely from the State constitution and laws, it would seem that the power of the courts to take cognizance of these cases could be withdrawn by appropriate legislation.

[1]People *v.* Remington (1890) 121 N. Y. 328; In the Matter of Bates (1886) 118 Ill. 524, 531; see note to People *v.* Remington 8 L. R. A. 458

[2]Much controversy has arisen as to the origin and basis of the bankruptcy rule. See dissenting opinion of White, J., in Merrill *v.* Nat. Bank of Jacksonville (1899) 173 U. S. 131. Early bankruptcy statutes directed a "rateable" or "ratelike" distribution. See Bromley *v.* Goodere (1743) 1 Atk. 75. The present laws both in this country and in England are mandatory in directing the application of the bankruptcy rule by the bankruptcy courts. See dissenting opinion of White, J., in Merrill *v.* Nat. Bank *supra.* It is suggested, however, that even if the courts did not originally feel obliged to adopt the bankruptcy rule because of statutory provision, it was in fact approved from convenience rather than on any principle of equity. It was a rule of practice. See Jervis *v.* Smith (N. Y. 1869) 7 Abb. Pr. [N. S.] 217; Bromley *v.* Goodere *supra;* Orders of Court (1794) 4 Bro. Ch. 548, 551.

[3]See Hauselt *v.* Patterson (1891) 124 N. Y. 349.

[4]Moses *v.* Ranlet (1822) 2 N. H. 488.

with the law of mortgages and pledges, that the creditor should be doubly sure, in his personal recourse against the obligor, and, further, in the possession of the security; and that he should be entitled to stand upon both rights.[5] Obviously if this is so he cannot be compelled to surrender or realize upon his security upon any doctrine of marshalling assets, for nothing is more fundamental than that equity will not apply this doctrine to the detriment of any incumbrancer, and *a fortiori* will not favor one party to the extent of robbing another of an advantage obtained by lawful diligence.[6] It is true that equity aims at equality, but that goal is not attained, it is submitted, by a rule which discriminates against certain creditors, different from the rest only by virtue of greater diligence, by paying them dividends upon a part only of their claim; and which forces the holder of the security either to surrender it entirely, or to accept some perhaps very rough approximation of its value. The desired equality, it would seem, is more nearly reached by the chancery rule. Preferences, indeed, may occur, but here they result rather from causes within the control of the respective creditors than from any inherent unfairness in the rule itself.[7]

If, then, the secured creditor is to be permitted to prove under the chancery rule for the entire debt, a further question is met. It must be determined at what moment the state of the account between the parties shall be considered fixed, and the proceeds of the security as realized by the holder cease to be applied to reduce the amount of the debt as a basis for dividends. In the principal case there was a general assignment for the benefit of creditors, and under these circumstances the point of time in question would seem to be, as there decided, the date of the assignment itself.[8] That transaction is intended to constitute each of the creditors the express beneficiary of a trust. Each is given a vested equity in the total assets, proportioned on the relation of his then existing claim to the total outstanding indebtedness; and the rights of each thereafter depend solely on his status as a *cestui que trust*. Clearly, then, a subsequent reduction of the debt itself cannot diminish this equity, which has now become the fixed basis of the creditor's claim for a share in the property assigned.[9]

This conclusion seems to be a natural and necessary consequence of the creation of a trust; but it suggests no adequate solution of the problem in the case of an insolvent debtor's death, which at common law raised no trust in favor of creditors, but left the personal representative, within certain statutory limits, as free in the payment of debts as the debtor himself.[10] The account, it would seem, must there-

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[5]People *v.* Remington *supra;* Moses *v.* Ranlett *supra.*

[6]Mason *v.* Bogg (1837) 2 Myl. & Cr. 443, 448; Merrill *v.* Nat. Bank *supra;* Logan *v.* Anderson (Ky. 1857) 18 B. Mon. 114; see Morrice *v.* Bank of England (1736) Talb. 217; Purdy *v.* Doyle (N. Y. 1829) 1 Paige 558.

[7]See Chemical Nat. Bank *v.* Armstrong (1894) 59 Fed. 372, (1895) 65 Fed. 573.

[8]Merrill *v.* Nat. Bank *supra;* see Patten's Appeal (1863) 45 Pa. 151, 160.

[9]Corbett *v.* Joannes (1905) 125 Wis. 370, 379; Chemical Nat. Bank *v.* Armstrong *supra.* In Illinois the court interpreted the local statute as fixing the vested interest of the creditors only on the presentment of claim. Levy *v.* Chicago Nat. Bank (1895) 158 Ill. 88.

[10]Jamison *v.* Adler-Goldman Co. (1894) 59 Ark. 548.

fore be fixed upon the same principles which, in the absence of assignment, would have governed during the debtor's life-time. Accordingly it is submitted that the moment when the creditor elects to rely no longer on his security alone, but to stand on his double right, and presents his claim against the personal liability of the obligor, should be determinative of the amount of the debt upon which the creditor may found his demand for dividends. Prior to that time his acceptance of the proceeds of his security is a voluntary reduction of the debt; after that moment, to consider it to be the same would be a violation of his right to rely on two separate and distinct assurances, the security in his possession, and the debtor's personal liability.[11]

BURDEN OF LOSS UNDER SPECIFICALLY ENFORCEABLE CONTRACTS OF SALE.—At law a vendor's rights against his vendee cease to exist if the subject-matter is destroyed or so substantially altered while the contract is still executory as to render performance according to the terms of the agreement impossible.[1] This naturally results from the consensual character of a contract. It would seem that in equity the same result should be reached, since the conception of specific performance excludes the notion of dispensing with performance on the part of either party. It is not enforcing the contract to permit the vendor to recover the purchase money without doing what he agreed to do. Equity and law should take the same view as to what constitutes performance; for a contract is defined not by law but by the parties, and the determination of its terms is accordingly a question of fact. Nevertheless the decided preponderance of authority is in accordance with *Nixon* v. *Marr,* (1911) 190 Fed. 913, in which case it was held that the vendee must accept, without compensation, property to which a loss had occurred between the formation of the contract and the time for performance.[2] This surprising result is clearly due to the fact that the vendor under a specifically enforceable contract is regarded in equity as a trustee for the vendee,[3] who, as *cestui que trust,* is the equitable owner of the property.[4] Hence the law of trusts in general determines rights acquired

[11]Erle *v.* Lane (1896) 22 Colo. 273; but see Morton *v.* Caldwell (S. C. 1849) 3 Strobh. Eq. 161, 164, overruled in effect in Wheat *v.* Dingle (1889) 32 S. C. 473. In some jurisdictions by statute real estate has been made the primary fund for the discharge of the mortgage debt, at least where there is a sufficiency of assets. See Hauselt *v.* Patterson *supra.*

[1]Wells *v.* Calnan (1871) 107 Mass. 514.

[2]Paine *v.* Meller (1801) 6 Ves. Jr. 349; Cass *v.* Rudele (1692) 2 Vern. 280; Brewer *v.* Herbert (1868) 30 Md. 301; Robb *v.* Mann (1849) 11 Pa. 300. But see *contra,* Gould *v.* Murch (1879) 70 Me. 288; Thompson *v.* Gould (Mass. 1838) 20 Pick. 134; Wilson *v.* Clark (1880) 60 N. H. 352. Until recently the law seems to have been in doubt in New York. See, on the one hand, McKechnie *v.* Sterling (N. Y. 1867) 48 Barb. 330; Gates *v.* Smith (N. Y. 1846) 4 Edw. Ch. *702, and, on the other hand, Smith *v.* McClusky (N. Y. 1866) 45 Barb. 610; Wicks *v.* Bowman (N. Y. 1874) 5 Daly 225; Listman *v.* Hickey (N. Y. 1892) 65 Hun 8, affirmed without opinion (1894) 143 N. Y. 630. But the loss seems definitely to be placed upon the vendee by Sewell *v.* Underhill (1910) 197 N. Y. 168.

[3]Pomeroy, Eq. Jur., (3d ed.) § 1406.

[4]Brewer *v.* Herbert *supra;* Robb *v.* Mann *supra;* Pomeroy, Eq. Jur., (3d ed.) § 1406.